(4)

NO. 90-507

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

E. WARNER BAILEY AND WIFE,
NONA ANN BAILEY, DEBTORS, PETITIONERS

VS.

EAST TEXAS PRODUCTION CREDIT ASSOC.,
FIRST REPUBLICBANK-LUFKIN (NOW FDIC),
SMALL BUSINESS ADMINISTRATION, AND
DALE THOMAS, TRUSTEE, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Court of Appeals clearly understood and were proper in their rejection of the Petitioners' claim that the District Court placed improper restraints on them at the July 18, 1989, hearing.

2. Whether the Court of Appeals erred by not allowing certain relevant evidence to be considered, evidence which was not made available to the Petitioners until after the July 18, 1989, hearing.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A19) is unpublished. The opinion of the District Court (Pet. App. A20-A25) is unreported.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered its opinion (Pet. App. A1-A19) April 26, 1990, and denied a Petition for Rehearing on May 29, 1990 (Pet. App. A26-A27). No written opinion was given. E. Warner Bailey and Nona Ann Bailey obtained an Extension of Time to file their Petition for Writ of Certiorari and subsequently filed their Petition on September 12, 1990. The East Texas Production Credit Association, after being granted a thirty (30) day extension of time, filed its Brief in Opposition about November 21, 1990. After three (3) extensions of time, the Federal Deposit Insurance Corporation (FDIC), through the Solicitor General's Office, filed its Brief in Opposition December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Several statements by both the counsel for the Solicitor General's Office (FDIC) and the counsel for the East Texas Production Credit Association (ETPCA) made in their Briefs under the heading "Statement of the Case" are simply not true and the Petitioners would like to point out to this Court these inaccuracies and correct these statements:

1. Counsel for the FDIC states on page 2, second paragraph, that the Baileys objected to their Chapter 7 liquidation proceedings which is not true. The records will reflect that the Baileys directed their attorney at that time, Howard Lee Norris, to file a motion to be converted. The reason for this being that the long, drawn-out

proceeding under their Chapter 11 did not allow the Baileys the opportunity to begin their business careers over.

2. Counsel for FDIC on page 3, last paragraph and page 4, first paragraph, stated that the court held a hearing on July 18, 1989, to allow the Baileys an opportunity to show cause why summary judgment should be set aside and why the court should not adopt the proposed Agreed Final Judgment. This was not the case at all, as we, the Petitioners pointed out in our Petition for Writ of Certiorari (page 12-13). There were severe restraints placed upon us so that we could not bring forth material differences in the stipulation of September 12, 1988, and the Agreed Final Judgment on July 18, 1989.

3. Counsel for ETPCA, on page 3, second paragraph, last sentence, states that First RepublicBank, Lufkin objected

to the homestead exemption of the 150.7 and 111.77 acre tracts (actually there are three tracts being 150.7 acres, 48 acres, and 73.77 acres). Nowhere in the records will this Court find that there was a timely objection made by RepublicBank-Lufkin (now FDIC) to the Baileys claim of their homestead exemption.

4. Counsel for ETPCA, on page 5, second paragraph, states that the District Court, over the Baileys' objection, ordered that Howard Lee Norris be permitted to withdraw as attorney for the Baileys, citing a reference (III R. A-10). The Baileys would state to this Court that there is no record whereas the Baileys objected to Howard Lee Norris withdrawing from this case as their attorney. However, the records will indicate that there were vigorous objections

made by both FDIC and ETPCA to Mr. Norris's Motion to Withdraw. To further substantiate the Baileys' position, they have, through counsel, instituted a lawsuit for gross negligence against Howard Lee Norris, and that is currently pending in another court.

In statements made by both FDIC and ETPCA, they failed to mention several very important actions that occurred prior to the Baileys having filed their Petition for Bankruptcy under Chapter 11, September 3, 1985.

These actions were as follows:

1. The Baileys' home in Lufkin, Texas, which was their homestead, was given on November 15, 1982, in exchange for $200,000 debt and release of the farm acreage to be their homestead. This was a transaction between the Baileys and the bank (now FDIC) through a Compromise

and Settlement Agreement.

2. The Baileys had moved and were living on the farm at the time the Compromise and Settlement Agreement was signed on November 15, 1982.

3. Monies borrowed from the bank (now FDIC) were not for purchase, tax or remodeling of farm property.

4. The lower courts, the FDIC, counsel for Jack D.Hicks, the SBA and the Chapter 7 Bankruptcy Trustee joined in unison to bar the Baileys from pursuing any discovery, production of documents and their taking of depositions from either the bank (now FDIC) or ETPCA.

5. ETPCA knew that the Baileys were living on the farm when they loaned new money to them on May 18, 1983.

6. None of the monies loaned the Baileys by ETPCA were for purchase, tax or remodeling.

ARGUMENT

The ETPCA brings up three points in their argument through their Brief in opposition:

1. ETPCA states that the Agreed Final Judgment of July 18, 1989, does not deviate materially from the stipulations of September 12, 1988. Nothing could be clearer than the facts presented by the Baileys in their Petition for Writ of Certiorari as outlined on pages 8, 9 and 10 of their Petition. Please refer to those pages for the direct quotes taken from the transcript of the hearing of September 12, 1988. There <u>is</u> a material difference in the stipulation of September 12, 1988, and the Agreed Final Judgment of July 18, 1989.

ETPCA states that the Bankruptcy Court, on March 1, 1989, ordered that the equipment could have been purchased by

the Baileys and further, after a 90-day period the automatic stay would be lifted. They further state that the Baileys reneged on this agreement. The Baileys are of the opinion that when a higher court (in this instance, the U. S. District Court) withdrew all pending cases from a lower court, that all proceedings in the lower court cease. This is clearly the case here; the District Court withdrew these cases from the Bankruptcy Court on February 9, 1989, to be effective March 1, 1989. This declares any order and pending proceedings in the Bankruptcy Court pertaining to this case as of February 9, 1989, or certainly March 1, 1989, to be moot.

2. ETPCA states that the District Court held no restraints on the Baileys at the hearing of July 18, 1989. The truth of the matter is that all parties

and courts concerned would like to declare this, but the record still stands and clearly shows that Judge Robert Parker of the U. S. District Court, Tyler, Texas, did place severe restraints on the Baileys as evidenced in the Baileys petition before this Court, pages 13, 14 and 15. Nothing could state this clearer than the opening and closing statements made by Judge Robert Parker.

This is the basis for the Petition for Writ of Certiorari - the undue restraints placed on the Baileys so that they were unable to defend themselves properly.

3. Our rebuttal to this argument is contained in No. 3 below, in answer to FDIC arguments.

The FDIC brings up the following points in their Argument to which we wish to respond:

1. The FDIC states that the Court of Appeals was correct in its opinion that the District Court held no restraints on the Baileys. The Baileys again refer this Court to the actual quotations from the records of the hearing held July 18, 1989, pages 13, 14 and 15 of their Petition for Writ of Certiorari, calling particular attention to the opening remarks of Judge Parker to the Baileys:

> "The Court invites you to address two things, and that is at the time the agreement was reached that resulted in the settlement of this case...whether there was at that time any matters that you consider to amount to fraud or mutual mistake."

And, this Courts' attention is also directed to the closing statement made by Judge Parker:

> "Ladies and gentlemen, the Court finds that there is no evidence of fraud or mutual mistake."

Whatever any lower court may want to

interpret, assume or surmise will not take away the restraints placed upon the Baileys at that hearing.

2. The FDIC asserts that the Statute 12 U.S.C. 1823(e), backed up by D'Oench, Duhme & Co. v. FDIC 315 U.S. 447 (1942) seals off or estopped the Baileys from any defense. As this Court well knows, 12 U.S.C. 1823(e), known as the "shield law" protects the FDIC from any and all claims that do not meet the four requirements: (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee and (4) shall have been, con-

tinuously, from the time of its execution, an official record of the bank.

The Baileys believe that the records of the bank would prove that these requirements can be met. However, as we have stated earlier in our Statement of this Reply Brief, the lower court barred the Baileys from making any discovery in the way of production of documents and taking any depositions. The Baileys have made claim that due process of law has been trampled by not allowing the Baileys to have made their discovery and have a trial.

In Howell v. Continental Credit Corp. 655 F2d 743 (1981), the U. S. Court of Appeals for the Seventh Circuit states:

"We have not been presented with any persuasive reason why appellants defense should not at least be tested at trial."

D'Oench, Duhme has not been read

to mean that there can be no defenses at all to attempts by the FDIC to collect on promissory notes. Where the note imposes bilateral obligations on the parties, rather than creating a unilateral obligation by the maker to pay a sum certain, courts have held that the maker may defend himself by contending that the bank breached its obligations under the note. FDIC v. McClanahan, 795 F.2d 512 (5th Cir. 1986). See, e.g., Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981); Riverside Park Realty Co. v. FDIC, 465 F.Supp. 305 (M.D. Tenn. 1978).

As the Baileys claim in their suit against the bank for the unlawful foreclosure, the bank did not fulfill its obligation to the Baileys according to the promissory note.

3. The FDIC states that the letter presented in the Baileys' Petition (A-37,

A-38) was signed by an employee who apparently had no knowledge of the facts of this case. The Baileys bring to this Court's attention that through a telephone conversation between Mr. Bailey and Mr. Loren T. Hooper, Legislative Attorney and Advisor with the office of Legislative Affairs of the FDIC, the Baileys were informed that Mr. Hooper had advised the construction of the letter and had approved its contents.

On December 15, 1990, the Baileys wrote a letter in oposition to the FDIC's request for another extension of time to file their Brief. Attached to that letter was a proposed Order for the U. S. Bankruptcy Court, Eastern District of Texas, Tyler Division (to settle the remaining portion of our lawsuit against the FDIC and Jack D. Hicks). As A-1 thru

A-7 of the Appendix to this Reply Brief, we have included the signed order from the lower court citing as their conclusion of law the doctrines of D'Oench, Duhme & Company and 12 U.S.C. #1823(e) as "shield" protection for the FDIC. The Baileys pray that this Court will include and act upon this order along with the Petition for Writ of Certiorari, since it covers the same issue with the FDIC.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

[Stamped EOD JAN 04 '91]

IN RE:

E. WARNER BAILEY AND WIFE, NONA ANN BAILEY, Debtors

E. WARNER BAILEY AND WIFE, NONA ANN BAILEY, Plaintiffs

VS.

REPUBLICBANK LUFKIN AND JACK D. HICKS, Defendants

CASE NO. TY--85-00814

ADV. NO. A-86-339

ORDER AUTHORIZING

COMPROMISE AND SETTLEMENT

Came on for hearing on the 27th day of November, 1990, the Joint Motion to Approve Compromise and Settlement filed by Dale Thomas, Trustee, and the Federal Deposit Insurance Corporation as Receiver for First RepublicBank Lufkin, N.A.,

formerly RepublicBank Lufkin ("FDIC"), and Debtor's Response and Objection thereto, and the Court, after hearing testimony and arguments of counsel and the Debtors and reviewing the Exhibits admitted into evidence in open court, makes the following findings and conclusions:

1. Debtors filed a Petition under Chapter 11 of the Bankruptcy Code on September 3, 1985.

2. This adversary was brought by Debtors against RepublicBank Lufkin and Jack D. Hicks in November, 1986, and was subsequently amended alleging against RepublicBank Lufkin wrongful foreclosure on personalty, fraud in the inducement, violation of the Deceptive Trade Practices Act and wrongful foreclosure on the alleged "Homestead" property.

3. The main bankruptcy case was

converted to Chapter 7 and Dale Thomas was appointed Trustee on May 15, 1987. The Trustee then intervened in this adversary.

4. In July, 1988, First RepublicBank Lufkin, N.A., formerly RepublicBank Lufkin, was declared insolvent and the FDIC was appointed as Receiver. Subsequently, the FDIC was substituted as Co-Defendant in this adversary.

5. By order entered on May 5, 1989, the Trustee was authorized to settle with Co=Defendant, Jack D. Hicks. Debtors did not obtain a stay pending appeal of that Order and the settlement with Jack D. Hicks has been consummated.

6. The remaining causes of action asserted against the FDIC as Receiver for First RepublicBank Lufkin, N.A. are being compromised due to the uncertainty of any recovery and to promote judicial economy.

7. The Trustee has evaluated the

case individually and through his counsel and it is his considered opinion that due to the highly speculative nature of the suit, the settlement for the sum of $2,000.00 is fair and equitable and represents maximum recovery to the estate with the least amount of expense.

8. The U. S. Trustee's letter of May 31, 1989 filed in this case and introduced as FDIC Exhibit "D" verifies that the Chapter 7 Trustee possesses full authority subject to Court approval to compromise and settle all causes of action in this adversary, including the wrongful foreclosure on alleged "homestead".

9. The wrongful foreclosure and homestead issue has been resolved by the Agreed Final Judgment entered on July 21, 1989, by Judge Parker in East Texas Production Credit Association v. E.

Warner Bailey and wife, Nona Ann Bailey, et al. Consolidated Civil Action Nos. TY-88-151 and TY-88-153, in the United States District Court for the Eastern District of Texas, Tyler Division, and affirmed by the Fifth Circuit Court of Appeals on April 26, 1990, being No. 89-2757.

10. The compromise and settlement is fair and equitable and is in the best interest of the bankruptcy estate.

CONCLUSIONS OF LAW

1. The doctrine of D'Oenche, Duhme & Company v. the FDIC, 62 Sup. Ct. 676 (1982) and subsequent cases relying on that doctrine and 12 U.S.C. #1823(e) can validly be raised as a defense by the FDIC as Receiver for First RepublicBank Lufkin, N.A. to all causes of action in this case.

2. The proposed compromise and settlement wherein the Trustee will ac-

cept $2,000.00 from the FDIC in full and complete compromise and full release of all claims against the FDIC as Receiver for First RepublicBank Lufkin, N.A. and dismissal of this adversary against the FDIC as Receiver for First RepublicBank Lufkin, N.A. is fair and equitable and in the best interest of the estate and should be granted.

To the extent that any finding of fact herein is improperly designated as a conclusion of law and to the extent that any conclusion of law herein is improperly designated as a finding of fact, such finding and/or conclusion shall be deemed to be included in the proper designation. Accordingly, it is therefore

ORDERED, ADJUDGED and DECREED that the Joint Motion to Approve Compromise and Settlement be and hereby is granted

in all respects and that the Trustee is authorized to settle all claims against the FDIC for the sum of $2,000.00 and dismiss this adversary as against the FDIC as Receiver for First RepublicBank Lufkin, N.A., formerly RepublicBank Lufkin.

SIGNED THIS 2nd day of Jan., 1991.

/s/ Honorable C. Houston Abel
UNITED STATES BANKRUPTCY JUDGE

ORDER PREPARED BY:

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